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NO. 83-226

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1983

STATE OF ARIZONA,

Petitioner,

-vs-

DENNIS WAYNE RUMSEY,

Respondent.

ON WRIT OF CERTIORARI TO THE ARIZONA SUPREME COURT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Does the Arizona capital sentencing procedure resemble a trial, thus rendering a life sentence an implicit acquittal of the death penalty, which would bar a subsequent imposition of the death penalty on double jeopardy grounds?

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STATEMENT OF THE CASE

Respondent Dennis Rumsey was charged by an Information filed December 6, 1979 with Armed Robbery and First Degree Murder.

At trial, one Kimberly Holmes testified that in October, 1979, she and Respondent were hitchhiking to Respondent's parents' home in Las Vegas. They were picked up by the victim, George Koslosky, in New Mexico or Texas. They stopped in Phoenix, where Respondent and the victim went into a store to buy some beer. Upon returning to the automobile, Respondent told his companion that the victim had over three hundred dollars ($300.00), and that he was going to rob the victim. Upon leaving Phoenix, Respondent was driving and the victim was sleeping in the back. After driving approximately forty-five minutes, Respondent pulled over to the side of the road, and awakened the victim. He ordered the victim at gunpoint to empty his pockets and get into the trunk. The victim refused, and Respondent eventually shot the victim twice and dragged him to the side of the road.

Respondent testified in his own behalf that he had never discussed robbing George Koslosky. Upon leaving Phoenix, he testified, the victim was driving the car, and Respondent passed out in the back seat from consuming alcohol and depressant drugs. Some time later, he awoke to find Kimberly driving the car, shaking and crying. She told him she had shot the victim because he had tried something with her when she had stopped the car to get aspirin from the trunk. Respondent admitted having told his brother in Las Vegas that it was he who shot the man, but explained that he had only done so to prevent Kimberly from being charged.

On June 6, 1980, Respondent was convicted of Armed Robbery and First Degree Murder. On July 3, 1980, the trial court conducted a sentencing hearing as required by A.R.S. §13-703. In its effort to prove aggravating circumstances, the state relied on evidence already presented at trial. Respondent called as a witness the foreman of the trial jury, who testified that the jury had rejected the premeditation theory, and had convicted Respondent based on the felony-murder rule, and that the jurors felt a life sentence was appropriate.

On July 7, 1980, the trial court announced its special verdict, finding that there were no aggravating and no mitigating circumstances. One specific aggravating factor which the trial court found did not exist was that the offense was committed as consideration for the receipt or in expectation of the receipt, of anything of pecuniary value. A.R.S. §13-703(F)(5). Contrary to the position the state took at the sentencing hearing, the trial court found that when §13-703(F)(5) is read together with §13-703(F)(4), it is meant to apply to contract-type killings, not to killings during robberies.

Because the trial court found that no aggravating circumstances were proven, the court was required to impose a sentence of life imprisonment without parole for twenty-five years. The trial court also imposed a sentence of twenty-one years on the armed robbery charge, to run consecutively to the sentence imposed on the murder.

Respondent appealed, arguing that the imposition of consecutive sentences was improper; the state cross-appealed, arguing that the trial court erred in ruling on a question of law by finding A.R.S. §13-703(F)(5) inapplicable to Respondent's case. The consecutive sentences were affirmed by the Arizona Supreme Court. State v. Rumsey, 130 Ariz. 427, 636 P.2d 1209 (1981). The court further ruled that, based on State v. Clark, 126 Ariz. 428, 616 P.2d 888, cert. denied, 449 U.S. 1067, 101 S.Ct. 796, 66 L.Ed.2d 612 (1980), which was decided eighteen days after Respondent's sentencing, the trial court had erred in ruling that A.R.S. §13-703(F)(5) only applied to murder for hire situations. (Id.) The sentence of life imprisonment on the murder charge was set aside, and the matter remanded for redetermination of aggravating and mitigating circumstances and resentencing on that charge.

On remand, the trial court held another sentencing hearing under A.R.S. §13-703. No further evidence was presented, both parties relying on the evidence presented at trial and the first sentencing hearing. Respondent argued that this Court's opinion in Bullington v. Missouri, 451 U.S. 430, 101 S.Ct. 1852, 68 L.Ed.2d 270 (1981), prohibited the trial court from imposing the death penalty after having previously sentenced Respondent to life. On February 4, 1982, the trial court announced its finding that the only aggravating circumstance was that the offense was committed for pecuniary gain under A.R.S. §13-703(F)(5). The trial court

found no mitigating circumstances, and ordered that Respondent suffer the penalty of death as required under A.R.S. §13-703(E).

The death sentence was appealed automatically under 17 A.R.S., Rules of Criminal Procedure, Rule 31.7. A number of issues were raised by Respondent on appeal; however, the Arizona Supreme Court limited its discussion to whether, under the Bullington v. Missouri, supra, analysis, the Arizona capital sentencing procedure is effectively a trial. State v. Rumsey, ___ Ariz. ___, 665 P.2d 48 (1983). The court found that it is, and that as a result, Respondent's original life sentence amounted to an acquittal of the death penalty. (Id.) A subsequent sentence of death, the court held, would violate the double jeopardy provisions of the Fifth Amendment to the United States Constitution, as made applicable to the states through the Fourteenth Amendment.

REASONS FOR DENYING THE WRIT

I. THE ARIZONA SUPREME COURT DID NOT DECIDE AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN DECIDED BY THIS COURT.

Petitioner contends that the question decided by the Arizona Supreme Court is a question of federal law which has not been decided by this Court. Respondent submits that Petitioner's analysis in this regard is misdirected. Petitioner views the question presented herein in the following way: "May the Arizona Supreme Court vacate an erroneous life sentence based upon a legal error and remand for resentencing to correct the trial court error?" (Petition for Writ of Certiorari, p. 11). Respondent respectfully submits to this Court that the question formulated by Petitioner misses the true question: Is Arizona's capital sentencing hearing effectively a trial? That question must be answered in order to answer the question formulated by Petitioner. When viewed in this way, it is clear that the only question of federal law involved herein has already been decided by this Court in Bullington v. Missouri, supra. In Bullington, this Court held that when a capital sentencing procedure resembles a trial, a sentence to life imprisonment under that procedure amounts to an acquittal as to the death penalty, preventing the later imposition of the death penalty. In the present case, the only decision the Arizona Supreme Court was required to make was an

interpretation of state law: Does the Arizona capital sentencing hearing resemble a trial? The Arizona court answered the question affirmatively, stating:

> In Arizona, as in Missouri, a special procedure is applicable to capital cases. The resemblance of this procedure to trial is apparent on examination of A.R.S. §13-703.
>
> ___ Ariz. at ___, 665 P.2d 48, at 53. (Emphasis added.)

Once the Arizona court made that determination, its action was directed by Bullington.

Petitioner contends that the Rumsey decision will affect similar resentencings in three states other than Arizona. Respondent submits that in fact it is up to the courts of those three states to determine if their sentencing procedures resemble a trial, and apply Bullington accordingly. Petitioner further contends that appellate courts in Arizona and the other three states will be hampered in reviewing life sentences which have been "erroneously or illegally imposed." In actuality, however, the Arizona Supreme Court does not review life sentences as it does death sentences. As the Arizona Supreme Court pointed out in its second opinion herein, although death penalty cases are automatically appealed to the Arizona Supreme Court, no appeal is required when a life sentence is imposed, and the state is not permitted an appeal unless the defendant has appealed. 665 P.2d 49, at 55, n. 10. The Arizona court further points out that it performs an independent review and proportionality review of cases in which the death penalty was imposed to determine if that sentence is excessive or disproportionate; it does not review life sentences to determine whether they are too lenient. 665 P.2d 48, at 55.

In summary, the decision of the Arizona Supreme Court herein did not constitute a decision of a federal question not previously decided by this Court, nor was it a decision that will affect cases or hamper review in Arizona and three other states. It was simply an interpretation of state law in answer to the question: Does the sentencing hearing described in A.R.S. §13-703 resemble a trial? The Arizona Supreme Court has held that it does. This Court has long held that it is bound to accept the interpretation of state law by the highest court of the state. Hortonville J.S.D. No. 1 v. Hortonville Ed., 426 U.S. 482, 488, 96 S.Ct. 2308, 2312, 49 L.Ed.2d 1 (1976); Groppi v. Wisconsin, 400 U.S. 505, 507, 91 S.Ct.

490, 492, 27 L.Ed.2d 571 (1971); Aero Mayflower Transit Co. v. Board of Railroad Com'rs, 332 U.S. 495, 499-500, 68 S.Ct. 167, 169, 92 L.Ed. 99 (1947).

For the above reasons, this Court should deny the Writ requested by Petitioner.

II. BECAUSE THE ARIZONA CAPITAL SENTENCING HEARING RESEMBLES A TRIAL, THE ARIZONA SUPREME COURT WAS CORRECT IN APPLYING THE DOUBLE JEOPARDY CLAUSE TO APPELLANT'S RE-SENTENCING.

Petitioner characterizes the issue presented here as a narrow one. With that Respondent would agree. When the issue is distilled down to its essential components, it is narrow indeed. Bullington v. Missouri, supra, states that when a capital sentencing resembles a trial, double jeopardy applies; the Arizona Supreme Court has held that the Arizona capital sentencing hearing resembles a trial. It is with this determination by the Arizona court that Petitioner takes issue.

Petitioner attempts to distinguish the Arizona sentencing scheme from Missouri's in eight different ways. Petitioner first points out that, unlike Missouri, Arizona has no jury involved in the sentencing. This distinction is not relevant to the question of whether the double jeopardy clause should apply. As the Arizona court pointed out in its unanimous opinion, "For purposes of double jeopardy, it has never made a difference whether a case was tried before a judge or a jury. See, United States v. Morrison, 429 U.S. 1, 97 S.Ct. 24, 50 L.Ed.2d 1 (1976) . . . ." 665 P.2d at 54.

Petitioner next points out that there are seldom live witnesses in an Arizona sentencing hearing. Again, this point is not relevant to the double jeopardy inquiry. Double jeopardy protection is afforded to a defendant on a criminal charge even though he may choose to submit the case for a decision by the trial court based on previous testimony or stipulated exhibits.

Petitioner's third and fourth points are that the Arizona statute does not require opening statements, and permits but does not require closing arguments. Again, these points are not relevant to the double jeopardy issue, since at a trial on the issue of guilt or innocence either or both parties may waive opening statement or closing argument without affecting the defendant's rights under the Double Jeopardy Clause.

The next distinction raised by Petitioner is that no instructions to the factfinder are required by the Arizona statute. Again, this has no effect on double jeopardy considerations. At a trial to the court on the issue of guilt or innocence, no instructions are required, as the court is presumed to know the law. The parties may, of course, argue the law to the court at the sentencing hearing, as is done quite regularly.

The sixth point argued by Petitioner is that although aggravating circumstances must be shown beyond a reasonable doubt, mitigation sufficient to call for a life sentence need not be shown beyond a reasonable doubt. Petitioner forgets that this is almost precisely the burden of proof which exists at a trial on guilt or innocence: The state must prove all of its case beyond a reasonable doubt. A defendant need not prove his innocence beyond a reasonable doubt. For instance, if a defendant argues alibi, he need not prove that alibi beyond a reasonable doubt, he need only raise some reasonable doubt that he is the guilty party.

The seventh argument raised by Petitioner is that evidence regarding aggravation is governed by the rules of evidence, while there is no such limitation on mitigation. Respondent submits that as the Arizona Supreme Court said, this distinction is insignificant. 665 P.2d 48, at 54. As the Arizona court pointed out, the distinction is true only of mitigating evidence presented at the sentencing hearing, not of mitigating evidence presented at trial. Id. Assuming the truth of Petitioner's statement that there are seldom live witnesses in an Arizona sentencing hearing, this distinction is particularly insignificant.

Petitioner's final distinguishing point, raised separately from the rest, is that the Missouri statute permits a jury to be lenient. The Missouri jury can give a life sentence even though they find the necessary aggravation for the death penalty and the lack of sufficient mitigation. This is prohibited in Arizona, since the Arizona statute makes the death penalty mandatory when the trial court finds aggravating factors, but insufficient mitigating factors. Somehow, Petitioner believes this distinction makes Missouri procedure more like a trial than Arizona's. Quite clearly, the precise opposite is true. Juries who decide the issue of guilt or innocence are never instructed that they may find a defendant not guilty, despite having found that the state proved his guilt beyond a reasonable doubt. In this respect, Arizona's procedure is far more like a trial than Missouri's.

Petitioner further contends that the capital sentencing procedure in Arizona is not a "final step" because the Arizona Supreme Court conducts an independent review of each case in which the death penalty is imposed. Petitioner's argument might have some validity if the Arizona Supreme Court independently reviewed both death penalties and life sentences imposed after capital sentencing hearings. However, as Petitioner candidly admits, the Arizona court has never increased a life sentence to death. The reason for this was clearly articulated in the unanimous opinion in the second Rumsey decision:

> We have never held that if the trial court finds sufficient mitigating circumstances we have independent power to reject its factual and legal conclusions and impose the death penalty. Our obligation on review is to determine whether "the punishment imposed is greater than the circumstances of the case warrant." State v. Richmond, 114 Ariz. at 196, 560 P.2d at 51. In capital cases "we necessarily undertake an independent review of the facts that establish the presence or absence of aggravating and mitigating circumstances . . . [to] determine for ourselves if the latter outweigh the former . . . ." Id. (citations omitted). Our proportionality review is not to determine whether life imprisonment was too lenient, but, rather, to determine "whether the sentences of death are excessive or disproportionate." Id.
>
> 665 P.2d at 55 (Footnote omitted.)

The court further stated:

> We hold, therefore, that the Arizona procedure is not a single indivisible hearing, but instead resembles a trial on the issue of life or death followed by the utilization of this court's appellate process to make a conscientious review on a statewide basis in order to assure rationality and "evenhanded operation" in the imposition of the death penalty. This review is conducted in order to determine whether the death penalty, when imposed by the trial court, should be reduced to life.
>
> 665 P.2d at pp. 55-56.

Petitioner also argues that the state "proved its case" at Respondent's original sentencing hearing, and that, therefore, allowing the state supreme court to "correct" the "erroneous" sentence would not violate the Double Jeopardy clause. Petitioner's position is not fully supported by the facts. After the original sentencing hearing, the trial court's special verdict announced the finding that there were no aggravating circumstances. Thus, the state failed to prove its case at the original sentencing hearing. It is true that eighteen days after Respondent's sentencing the Arizona Supreme Court issued an opinion in another case which disagreed with the trial court's ruling that A.R.S. §13-703(F)(5) did not

apply to murders which occur during a robbery. State v. Clark, supra. That, however, is irrelevant to double jeopardy considerations. The trial court's finding that there were no aggravating circumstances was a finding that the state failed to prove its case, and amounted to an acquittal of the death penalty. No matter how erroneous an acquittal may be, even though based on an incorrect interpretation of law, it cannot be overturned on appeal. Arizona v. Washington, 434 U.S. 497, 98 S.Ct. 824, 54 L.Ed.2d 717 (1978); Fong Foo v. United States, 369 U.S. 141, 82 S.Ct. 67, 7 L.Ed.2d 629 (1962).

Petitioner contends that the present case is similar to United States v. Wilson, 420 U.S. 332, 95 S.Ct. 1012, 43 L.Ed. 232 (1975), in which this Court held that the Double Jeopardy Clause permitted overturning a post-verdict acquittal. In fact, Wilson is plainly distinguishable from Respondent's case. In Wilson, the jury had returned a verdict of guilty. After that verdict, the trial court dismissed the indictment on the grounds that the government had caused unwarranted pre-indictment delay which prejudiced the defendant. The government appealed from the trial court's post-verdict ruling. This Court held in Wilson that the government's appeal did not violate the Double Jeopardy Clause, because should the government prevail, the original jury verdict of guilty would simply be reinstated. The facts of Wilson stand in stark contrast to the facts of the case before this Court. In the present case, there was no original special verdict finding aggravating circumstances which could be reinstated; there was no death penalty which could be reinstated. The only way that the error of which the state complained could be corrected would be to require a new hearing and a new verdict. This is unlike Wilson, where no new trial and no new verdict were required. This distinction is precisely the ground upon which this Court held the government's appeal in Wilson to be permissible, and is precisely the reason that imposition of the death penalty at Appellant's resentencing was a violation of the Double Jeopardy Clause.

Petitioner has cited Fitzpatrick v. State, ___ Mont. ___, 638 P.2d 1002, cert. denied, 449 U.S. 891, 101 S.Ct. 252, 66 L.Ed.2d 118 (1981), stating that Montana's death sentencing procedures are similar to Arizona's, and that the Montana Supreme Court held its procedure to be unlike a trial. Fitzpatrick is readily distinguishable from the present case on some major points. The Montana

court stated, in distinguishing their procedure from Missouri's, that the Montana procedure does not require proof beyond a reasonable doubt, and gives the judge wider discretion in imposing a sentence other than death. 638 P.2d 1002, at 1017. Arizona does, of course, require proof beyond a reasonable doubt, and directs the judge quite precisely as to when the death penalty shall be imposed and when a life sentence shall be imposed.

The Arizona capital sentencing procedure carries the major hallmarks of a trial: the sentencing judge does not have a wide range of penalties to choose from, only two; there are specific standards governing that choice; and the burden is on the state to prove certain aggravating factors beyond a reasonable doubt before the death penalty can be imposed. The Arizona Supreme Court was correct in determining that the Double Jeopardy Clause applied to Respondent's sentencing, and that it barred the trial court from resentencing him to death after previously sentencing him to life.

CONCLUSION

The case before this Court does not present a question of federal law which has not been settled by this Court. The only question decided by the Arizona Supreme Court was one of state law, i.e., that the Arizona capital sentencing procedure amounts to a trial. Further, the Arizona Supreme Court was correct in determining that said sentencing procedure is effectively a trial, because that sentencing procedure includes the significant hallmarks of a trial on the issue of guilt or innocence. For those reasons, the writ of certiorari to the Arizona Supreme Court should be denied.

RESPECTFULLY SUBMITTED,

ROSS P. LEE
Maricopa County Public Defender

By _____
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ON WRIT OF CERTIORARI TO THE ARIZONA SUPREME COURT

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

Respondent, DENNIS WAYNE RUMSEY, pursuant to Rule 46, Supreme Court Rules, asks leave to file the attached Brief In Opposition To Petition For Writ Of Certiorari to the Arizona Supreme Court without pre-payment of costs and to proceed in forma pauperis. The Respondent was represented by the Maricopa County Public Defender's Office, of which the undersigned is a member, in the Superior Court of Maricopa County, and on appeal to the Arizona Supreme Court. The Respondent's Affidavit in support of this motion is attached hereto.

Respectfully submitted this 9th day of September, 1983.

ROSS P. LEE
Maricopa County Public Defender

By _____
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Deputy Public Defender
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Telephone: (602) 258-7711
Attorney for Respondent

No. 83-226

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1983

STATE OF ARIZONA,

Petitioner

-vs-

DENNIS WAYNE RUMSEY,

Respondent.

AFFIDAVIT

I, Dennis Wayne Rumsey, being first duly sworn according to law, depose and say, that I am the Respondent in the above-entitled case; that I am currently incarcerated in the Arizona State Prison; that in support of my motion for leave to proceed without being required to prepay fees, costs or give security therefore, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I am not presently employed; that my only income in the past twelve months was ten dollars given to me by my mother; that I do not own any cash, checking or savings accounts, nor any valuable property; that both before the state trial court and on appeal, I was represented by appointed counsel; that I believe the State of Arizona is not entitled to the redress sought in this case; the nature of said cause is briefly stated as follows:

I was sentenced to a life term in the Arizona Department of Corrections on a charge of Murder, First Degree. On remand for resentencing, I was sentenced to suffer the penalty of death. On appeal, the Arizona Supreme Court set aside the death penalty on the ground that its imposition at resentencing violated the provisions of the Double Jeopardy clause. In this proceeding, the state is seeking to have the death penalty reinstated.

I understand that a false statement in this affidavit will subject me to penalties for perjury.

DENNIS WAYNE RUMSEY

SUBSCRIBED AND SWORN TO before me this 9th day of September, 1983.

Notary Public

My Commission Expires:

My Commission Expires Dec. 8, 1985

William H. Brithart

NO. 83-226

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October Term, 1983

STATE OF ARIZONA,

Petitioner,

-vs-

DENNIS WAYNE RUMSEY,

Respondent.

ON WRIT OF CERTIORARI TO THE ARIZONA SUPREME COURT

CERTIFICATE OF SERVICE

I hereby certify that one copy of the Motion For Leave To Proceed In Forma Pauperis and Affidavit, the Brief In Opposition To Petition For Writ Of Certiorari to the United States Supreme Court, and the Certificate of Service were served on each of the following persons by depositing the copies in a United States post office, with first-class postage prepaid, on this 9th day of September, 1983:

WILLIAM J. SCHAFER III
Chief Counsel, Criminal Division
Arizona Attorney General's Office
1275 West Washington Street
Phoenix, Arizona 85007
Attorney for Petitioner

I further certify that all parties required to be served have been served.

ROSS P. LEE
Maricopa County Public Defender

By _____
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